No. 14925

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

YIP MIE JORK,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

APPELLANT'S REPLY BRIEF.

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Appellee's Denial of Request of Appellant to Enter the United States and Testify at the Trial.

In his Opening Brief, appellant complained that he was precluded by action of the appellee from coming to the United States, under law and regulations provided for such purpose, so that he might testify in his own behalf at the trial of the action. Appellee answers (Appellee's Br. pp. 8-9) that there is no evidence that appellant submitted a sworn application for a Certificate of Identity which would permit him to be granted a travel document.

Appellee has not searched his file adequately for, had he done so he would have ascertained that appellant *did submit* an application for Certificate of Identity to the

American Consul General at Hong Kong, B. C. C. on or about May 14, 1953, and the said Consul refused to act upon such Certificate because of specific instructions received from the Department of State in this case. The letter from the office of the American Consulate General, Hong Kong, B. C. C., dated April 23, 1954, advising appellant's counsel of a refusal to act upon the application for Certificate of Identity, is quoted in full in the Appendix to this Brief.

Appellee suggests further that the testimony of the appellant could have been obtained by deposition. Since appellee himself places such great emphasis upon the trial court's observation of the demeanor of the witnesses (Appellee's Br. pp. 23-24), the suggestion exudes impotency. Counsel's recollection is that the State Department file, in evidence, pertaining to the application for United States passport, contains statements and testimony of appellant under oath concerning his pedigree and history. Hence, a deposition would add little to the facts already offered and would give no opportunity for the trial court to observe the appellant, judge his credibility in the live feel of the open forum, and test his knowledge of the family history and related matters.

That appellee is able to, on the one hand, effectively and completely estop the appellant from appearing before the trial court as a witness in his own behalf on the priceless issue of his right to be recognized as a United States citizen, and, on the other hand, blandly urge that appellant has not sustained the burden of proof, creates a

situation that counsel has found it extremely difficult to reconcile with a sense of fairness and justice.

In the case of *See Yee Ming v. Dulles,* 136 Fed. Supp. 199 (U. S. D. C., W. D., Pa.), where counsel for the plaintiff was seeking a Certificate of Identity in behalf of his citizen claimant, the court said at page 200:

> "In the event of failure to secure the presence of petitioner, the trial plans would require an attempt to establish petitioner's contention by indirect or substantial evidence.
>
> "The additional expense and effort, as well as a possible unsatisfactory record, if the latter method of trial is adopted, indicate why counsel is willing to have actual disposition of the case delayed until he has exhausted every possibility of having petitioner present in court."

The Credibility of the Witnesses.

The alleged discrepancies in the testimony of the witnesses, Chew Jock and Chin Shee, mentioned in Appellee's Brief at pages 19 to 22, all stem from the Immigration Service form which is prepared by a Chinese interpreter immediately prior to disembarkation of Chinese passengers from vessels arriving in the United States. It is a form utilized only in the cases of persons of the Chinese race independent of nationality. These Chinese, in the moments immediately prior to docking of the arriving vessel, are supposed to detail unfailingly, among many other things, all introductions to families of United States residents and visits to the homes of United States residents, occurring during the period of their stay in China. The

absences, in most instances, extend over a period of at least one year. It would require the most alert memory to furnish the details required by the form and, for that reason, it falls far short of completeness or unerring accuracy.

With respect to the testimony of the important witness, Leong Lan Gin, who was appellant's playmate in Kin Mo Village, the court seems to have challenged her testimony only because it thought it strange that an "eleven-year-old boy will play with a six-year-old girl." [Tr. 201.] However, when we reflect upon the actual birth dates of the two children (February 22, 1928 and September 11, 1930), it will be noticed that there is *only 2½ years difference in age,* although the witness, Leong Lan Gin, guessed that there was a difference of "about five years or so." [Tr. 106.] Counsel is prompted to say that at least a range of 2½ years in the ages of childhood playmates, irrespective of sex, is quite usual and common and evaporates the ground for suspicion here.

Appellee has made no comment upon the testimony of Fay Jean Chew, first cousin of the appellant, whose testimony is unimpeached.

Reasons for the Lower Court Judgment.

Although appellee argues that the findings of the court below are unassailable, the reasons for the findings and judgment can be considered on review. This Court has done so heretofore. See *Wong Sho Ging v. Brownell,* 218 F. 2d 910, decided January 21, 1955, which case also involved a suit for declaratory judgment of citizenship.

Although the trial court made a statement concerning the credibility of witnesses in general in this type of proceeding [Tr. 200-201], the reason for the judgment is contained in the oral remarks preceding the decision. The crux of the reasoning is located in the following statement of the court [Tr. 200]:

> "I was hoping that we could have a witness who could testify as to the birth of the boy and also testify that he had seen the boy grow up in the home, and so on. But we have witnesses who can only testify partially."

The trial court in the case at bar seems concerned only with the fact that the proof did not cover every period of appellant's life and specifically in the days of the cradle. At most, the "gap" is but a mere four years. Most of us could not satisfy the burden which was suggested by the lower court in these words [Tr. 204]:

> "Just because there is a child in the home, I don't think that is an indication that the woman in the home is the mother of the child, or the father who goes to the home is the father of the child. In China, the Chinese people have a strong feeling of family responsibility. Of course, there is no evidence here that this alleged mother took a stranger into the family or relative into the family, but, however, it is possible such a thing happened."

The facts and the law should be construed as far as is reasonably possible in favor of a citizen. (*Schneiderman v. United States,* 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796; *Fukumoto v. Dulles* (9 Cir.), 216 F. 2d 353.)

The words of this Court in *Chin Chuck Ming v. Dulles,* 225 F. 2d 849, decided September 6, 1955, furnish a judicious guide by which the proof offered in appellant's case should be measured. It was said in that case at pages 852 and 853:

> "We are not dealing here with one seeking to become a citizen but with the right to establish a claimed existing United States citizenship. Such citizenship is described by the Supreme Court as regarded by many as the highest hope of civilized man. In Schneiderman v. United States, 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796, it states: 'For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized man.' "

See also:

See Yee Ming v. Dulles, supra.

Respectfully submitted,

MARSHALL E. KIDDER,

Attorney for Appellant.

APPENDIX.

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

American Consulate General,
Hong Kong, April 22, 1954.

Marshall E. Kidder, Esquire,
408 South Spring Street,
Los Angeles 13, California.

Sir:

Reference is made to your letter of April 7, 1954 inquiring as to the statuts of the citizenship case of Yip Mie Jork. As the subject was informed by the Consulate General's letter of September 11, 1953 the Department of State disapproved his passport application on August 27, 1953 on the ground that his claimed identity had not been established.

Administrative action was completed in this case and the disapproval of the passport application took place, as will be seen, approximately eight months after the Nationality Act of 1940 had been repealed by Section 403(a) of the Immigration and Nationality Act which took effect on December 24, 1952. Since it appears, therefore, that Section 503 of the Nationality Act of 1940 (8 USC 903) does not apply in this case, the Consulate General, on the instructions of the Department of State, is taking no further action on the application for a Certificate of Identity which the subject executed on May 14, 1953.

Please be assured that if further instructions are received from the Department of State concerning this case, the Consulate General will take any action required without delay.

Very truly yours,

For the Consul General:

/s/ S. M. Backe

/t/ S. M. Backe

American Consul.